No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Cases

Codes

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BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

We do not believe that the appellant's statement of the case supplies a clear picture of the essential facts and therefore will restate the facts to be as follows:

The appellant, Dr. Everett D. Ivey, a physician, purchased from time to time certain acreage in Colusa County, California, for the purpose of renting duck

hunting privileges (T.R. 87-91). The purchase of these parcels of land began in 1947 (36 acres) and by 1953 Dr. Ivey had purchased over 450 acres of land at a total cost of in excess of $56,000.00 (T.R. 87-91).

These properties were gradually improved by the erection of duck barrels (T.R. 92) and other improvements (T.R. 93). Duck shooting privileges were sold by Dr. Ivey at $150.00 to $300.00 per person (T.R. 85).

There is no question but that Dr. Ivey was the sole owner of the duck club business and that he operated it as a business enterprise (Court's findings 5 and 6; T.R. 17). That such activities were in fact a business enterprise was stipulated to during the trial by appellant's counsel (T.R. 95).

In October of 1953, certain waters being conveyed through a ditch on one of the parcels of duck hunting land flooded and damaged a crop of rice resulting in a judgment for $33,000.00 in favor of one Alpheus Brian against Dr. Ivey (Admitted in Dr. Ivey's Answer T.R. 11-12).

Thereafter a dispute arose between the appellant and appellees herein as to whether or not a certain insurance policy written by the appellees insured Dr. Ivey against the rice crop damage judgment. An action for declaratory relief was filed by the insurance companies (appellees herein) against the appellant, Dr. Ivey, which resulted in a judgment based on findings that appellees insurance policy and coverage did not provide for property damage insurance coverage for Dr. Ivey's Duck Club properties.

THE FINDINGS.

The Findings of Fact and Conclusions of Law that were made and duly entered by the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury are as follows (T.R. 25-30):

"Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey (its Comprehensive General Automobile Liability Policy #10122; that under 'Coverage C—Property Damage Liability—Except Automobile' there was no premium charged and no property liability afforded defendant, Everett D. Ivey, insofar as the Duck Club and the office premises are concerned.

2. That there was attached to the said policy and forming a part of said policy an endorsement entitled 'Individual As Named Insured'; that said endorsement become effective on January 15, 1953.

3. That said 'Individual As Named Insured' endorsement contained the following language:

'It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business at which named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

"Business" includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's resi-

dence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows.'

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That a premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That a premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule (Plaintiff's No. 2 in Evidence), under the column headed B.I. which stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule (Plaintiff's No. 2 in Evidence) is not a part of the policy but

was supplied to the agent of the insurer, Mr. Duncan H. Knudsen, who sold the insurance to the defendant, Everett D. Ivey.

11. That the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property.

14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled 'Alpheus Brian v. Everett D.

Ivey, et al.' is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of Policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damage insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: March 12, 1957.

/s/ Michael J. Roche,
Chief Judge of the U.S. District Court."

THE INSURANCE POLICY.

The policy and endorsement received by Dr. Ivey are on standard printed forms used by a great number of Casualty Insurance Companies. The policy (Defendant's Ex. A, T.R. 7) is entitled "Comprehensive General Automobile Liability Policy." It appears from its contents that it is a combination policy covering comprehensive liability in addition to automobile liability. It is neither mis-named nor mis-labeled. Endorsement No. 1. "Individual As Named Insured" is the only one material to this suit. Endorsements Nos. 2, 3, 4, and 5, have no application. Assuming, but not admitting, there is ambuguity in endorsements Nos. 2, 3, 4, and 5, it would have no bearing in this action.

Appellant would have the Court believe that there is a conflict between the basic policy and endorsement No. 1 and points out that the endorsement would control.

In his effort to create an ambiguity appellant has misinterpreted the premium charge of $83.15 as shown on the Survey of Hazards (Plaintiff's Exhibit No. 1) and on the Extension Schedule (Plaintiff's Exhibit No. 2). This premium, it will be noted on the reverse side of the Extension Schedule (Plaintiff's Exhibit No. 2), is for miscellaneous liability coverage in addition to the automobile liability coverage. Dr. Ivey did not receive the so-called "phantom coverage" (Appellant's Brief, p. 18) for this premium. As shown in the Extension Schedule he received coverage on the following locations (Plaintiff's Exhibit No. 2, T.R. 64):

Premises	Premium	Property Damage
	Bodily Injury Limits $300,000.00	
46 Hardwick Ave., Piedmont, Calif.	$19.20	INCL.
Hamburg, Calif.	5.70	INCL.
40 Hardwick Ave., Piedmont, Calif.	6.65	INCL.
10 Acres at Almo, Calif.	3.80	INCL.
Duck Club—372.2 acres	40.00	
Medical office 230 Grand Ave., Oakland	8.00	
	$83.15	

It is readily apparent that the first four items are non-business activities of Dr. Ivey which come under

Endorsement No. 1 and the last two items are business activities of Dr. Ivey and come under the basic policy.

Appellees agree that Endorsement No. 1 does alter the insuring agreement of the basic policy but this does not necessarily mean that this is an ambiguity because the change is clearly set forth in the wording of the endorsement.

Appellant's interpretation of Endorsement No. 1 is contrary to the plain interpretation of ordinary words. Nowhere in *Endorsement* No. 1 does it purport to extend either bodily injury liability coverage or property damage liability coverage to the *business* pursuits in which the named insured is the sole owner. That coverage is provided under the basic policy if the insured wants to *pay for it*. In our present case Dr. Ivey chose to pay for only bodily injury liability coverage under the basic policy. The business pursuits of which the named insured is the sole owner are expressly *excepted* under Endorsement No. 1.

Appellees respectfully submit that a fair reading of the endorsement is that:

> 1. *The policy* applies to appellant's business pursuits in connection with any business of which he is the sole owner and to his non-business pursuits incidental thereto, and II. *Except* as it applies to the *conduct of a business of which the named insured (appellant) is the sole owner,* the *policy* is *amended,* to provide the appellant with coverage for both bodily injury and property damage. This means that the Endorsement provides both bodily injury liability coverage and property

damage liability coverage to the *personal* activities of the appellant.

II.

ARGUMENT OF APPELLANT.

Each and every Finding of Fact and Conclusion of Law are complained of by appellant as being contrary to the evidence and the law.

Essentially the contentions of appellant may be fairly summarized as follows:

1. That the $40.00 premium paid by Dr. Ivey for *bodily injury* (Plaintiff's Ex. No. 2, T.R. 69) was a "flat charge" premium obligating appellees to pay the *property damage* claim arising out of the rice crop damage action.

2. That appellees are estopped from claiming that the charge was for bodily injury coverage and not for property damage coverage.

3. That there was ambiguity and mislabeling of the insurance policy.

4. That it was "semantically permissible" to interpret Endorsement No. 1 as including property damage coverage on the Duck Club.

5. That certain testimony of Duncan H. Knudsen, an insurance agent, was improperly stricken on motion of appellees.

We will discuss these arguments in the order named.

III.

APPELLEES' ARGUMENT AND POINTS AND AUTHORITIES.

1. THE $40.00 PREMIUM CHARGE.

As we have heretofore set forth the $40.00 premium charge was one item of a total premium charge of $83.15 (Plf's. Ex. No. 2, T.R. 64) and did not include property damage coverage. There were six properties covered under the $83.15 total premium charge, four of them were covered for bodily injury liability and property damage. Two of those properties i.e.—the Duck Club and the medical office at 230 Grand Ave., Oakland, California, were covered for bodily injury coverage only and not for property damage.

The evidence and the trial Court's findings clearly establish that appellant did not buy and pay for property damage liability insurance on the two business properties of which he was the sole owner, namely,

1. Physician's office premises at 230 Grand Avenue, Oakland, California.

2. Duck Club premises in Colusa, California.

The extension schedule (Plaintiff's Exhibit No. 2) clearly shows the $40.00 premium charged Dr. Ivey was placed in the estimated premium column headed B.I. (Bodily Injury) Incl. (Included) and is not typed in the column headed P.D. (Property Damage). The same is true of the $8.00 premium for the physician's office premises. It, too, is placed under the B.I. (Bodily Injury) column and the words INCL. are not typed in under the P.D. (Property Damage) column.

Were it the intention of the parties to provide property damage liability coverage for the Duck Club and/or for the office premises it would have been a simple matter to type in the appropriate letters in the P.D. (Property Damage) column, and compute the proper premium therefor.

The attitude of parties and the interpretation placed by them on the policy and its endorsement at the time when a dispute first arises under the policy is a strong indication as to their intent. The evidence shows that Dr. Ivey was first notified by Mr. Brian, that Mr. Brian had suffered a loss, in the latter part of November or December 1953 (Reporter's Transcript, page 62, line 14). He first received a long distance telephone call from Mr. Brian and later a letter from Mr. Brian's attorney. He first notified Mr. Knudsen when he received a legal Summons in February 1954 (Reporter's Transcript, page 66, lines 16-19). He testified that his first impression was his insurance did not provide coverage and finally he called Mr. Knudsen who said he didn't think it was covered (Reporter's Trancript, page 72, lines 12-14). It is the position of appellee that this is strong evidence to show the intent of the parties and their knowledge that there was no Property Damage Liability Coverage on the Duck Club under the policy or its endorsement.

The evidence disclosed that Mr. Knudsen received the Extension Schedule (Plaintiff's Exhibit No. 2) every year and was well aware of the fact that the premium charge was placed in the B.I. (Bodily Injury) column and the words INCL. were not typed

in the column headed P.D. (Property Damage). He forwarded the renewal policy to Dr. Ivey every year who accepted and retained the policy and endorsement without objections. Dr. Ivey, therefore, became bound by its terms and cannot now be heard to say that he did not read it or know its terms. *Madsen v. Maryland Casualty Company,* 168 Cal. 204 at 206, 142 Pac. 51.

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2. THE CLAIMED ESTOPPEL.

Appellant's contention that appellees are estopped from contending that the Duck Club property was not covered for property damage is based primarily on the testimony of Duncan H. Knudsen's interpretation of the term "flat charge" (R.T. 124).

The witness, Ben Havner (R.T. 80-81) who testified on behalf of appellees clearly explained the meaning of the term "flat charge" as follows:

> "Q. Will you tell the Court, please, what is meant by a flat charge?
>
> A. Usually it is a charge not subject to further adjustment. Some charges are adjusted later at the end of the policy period or during the policy period, but usually a flat charge is a fixed premium regardless of the period of coverage.
>
> Q. (By the Court). Fixed?
>
> A. That's right.
>
> Q. (By Mr. Bacon). And when that term appears on this Extension Schedule under the column 'Rates', that means, where it is identified by bodily injury and P.D., it is a flat charge for both; is that correct?
>
> A. No, it does not mean that.
>
> Q. What does it mean, then?

A. It means a flat charge was made only for bodily injury in this particular case.

Q. I would like to ask you then what is meant [40] by the appearance down here of a rate. I see a figure down here after the item 230 Grand Avenue, physician's office, and I see a rate for bodily injury in that report there.

A. That is correct.

Q. That is .896?

A. That is correct.

Q. And that is the bodily injury rate?

A. That is per hundred square feet; that is what it is.

Q. On the doctor's office?

A. That is correct.

Q. And nothing appears in the P.D. column?

A. That is right.

Q. And when you put a flat charge in both columns, you say it is confined to bodily injury?

A. The coverage only applies to the lines for which a premium charge is made. The only premium charge on there is under bodily injury column with respect to the doctor's office.

Q. But here in this column you have only the words 'estimated premium'?

A. That is correct.

Q. And the estimated premium in each instance where you have a flat charge appears only in one column?

A. That's right.

Q. But it includes property damage, does it not, also? [41]

A. That expression 'flat charge' applies only to the amount of premium charged; it has nothing to do with the rates.

Q. What does '-incl' mean in the property damage column?—that word right there.

A. That means 'included'.

Q. And that means that that property damage is included?

A. For those classifications.

Q. In this charge?

A. That's right.

Q. What is a flat charge?

A. That is correct.

Q. And it is correct, is it not, that that term, 'flat charge', appears opposite the item which you have listed on your extension as duck club rated as—it appears flat charge, doesn't it? (Reporter's Transcript 79-81).

A. With respect only to the bodily injury premium."

It seems clear that there was no estoppel proven against the appellees herein.

The cases cited by appellant in support of their argument on estoppel are not relevant to the facts of the case at bar.

In *Motor T Co. v. Great American Indemnity Co.,* 6 Cal. 2d 439, 58 Pac. 2d 374, there was an affirmance of a judgment for the plaintiff on the recovery under an insurance policy involving the construction of language concerning whether or not a certain motor vehicle was an "owned" or "non owned" automobile and the question of the proper registration of a motor vehicle was resolved against the insurance company. There the insured paid for the specific coverage re-

quested and the Court applied estoppel under the facts involved.

The case of *Ames v. Employers Casualty Co.,* 16 Cal. App. 2d 255, 60 Pac. 2d 347 also cited by appellant merely holds that one applying for an insurance policy has the right to assume that he will receive the policy applied for. Apparently the insurance company contended that certain false warranties concerning a prior cancellation of insurance by another insurance company barred the action. The trial Court made a specific finding that there was no false statement made by the insured and the finding and judgment was affirmed on appeal.

The case of *American Employers Ins. Co. v. Lindquist,* D.C. Cal. 1942, 43 F. Supp. 610 cited by appellant is quite similar to the *Ames* case, just discussed. There again an insurance company relied on certain exclusives in the insurance policy concerning a covenant against explosives, which was held to be included through either mistake or inadvertence by the insurance company.

We believe that the correct rule of interpretation of insurance contracts as declared by the California decisions may be briefly summarized as follows:

It is the duty of the Court to ascertain the intention of the insured from the contract, and give that intention effect provided it does not contravene public policy or statute.

Webster v. State Mut. Life Assur. Co., 50 F. Supp. 11 modified 148 F. 2d 315.

An insurance policy must be read as a whole and an interpretation adopted which will give effect to parties' intent.

Darmour Prod. Co. v. Ins. Co. of North America, 47 Fed. 2d 790.

While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, Courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof.

Sampson v. Century Indemnity Co., 8 C. 2d 476 at 480, 66 Pac. 2d 434.

Where provisions of an insurance policy are definite and certain there is no room for interpretation and the Courts will not indulge in a forced construction in order to cast a liability upon insurer which it has not assumed.

National Auto. Ins. Co. v. I.A.C., 11 C. 2d 689, 81 Pac. 2d 926.

The insurance policy is but a contract to be construed from the language used; and when the terms are plain and unambiguous, it is the duty of the Courts to hold the parties to such contract.

Lowenthal v. Fidelity & Casualty Co., 9 C.A. 275, 98 Pac. 1075.

Courts will not relieve the parties from the plain stipulations of the policy.

Kautz v. Zurich General Acc. & Liab., 212 C. 576, 300 Pac. 34.

Where there is no ambiguity in a contract of insurance, Courts will indulge in no forced construction against the insurer, and the policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the surrounding circumstances.

Blackburn v. Home Life Ins. Co., 19 C. 2d 226, 120 Pac. 2d 31.

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3 AND 4. THE CLAIMED AMBIGUITY.

We believe that from what has been previously said we have shown that there was no ambiguity in the policy or insurance or its applicable endorsements. The Trial Judge found no ambiguity and the Findings are clear in that respect.

As to the argument of appellant that the policy was "semantically susceptible" to an interpretation contrary to the trial Court's findings, we feel that the California Supreme Court in the case of *Sampson v. Century Indemnity Co.* (1937), 8 C. 2d 476, 66 Pac. 2d 434 (heretofore cited) has the proper answer to such contention where it said (p. 480):

> "While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, Courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof. There is no difficulty in so ascertaining the intention of the

parties to this action as to the place of payment, and the Court must give effect to that intention. (Burr v. Western States Life Ins. Co., 211 Cal. 568, 576 [296 P. 273, 276]."

In accord

Barnhart Aircraft Inc. v. Preston, 212 C. 19, 297 P. 20.

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5. THE MOTION STRIKING CERTAIN TESTIMONY.

Certain testimony of Duncan H. Knudsen, relative to his attempted interpretation of the insurance policy and the endorsements were permitted in evidence by the Trial Judge, subject to motions to strike. Later certain portions of the testimony were stricken.

As we have heretofore in this brief pointed out, there was no ambiguity in the basic insurance policy or the relevant endorsements.

Appellant has cited two cases in his brief in support of his contention that it was error to strike such testimony. Neither of the cases cited are applicable to the case at bar.

In *Simmons v. California Inst. of Technology,* 34 C. 2d 264, 209 Pac. 2d 581 (cited by appellant, involved fraud and fraudulent inducement where a parol promise was made to induce the execution of a contract.

The second case cited by appellant of *Shiver v. Liberty Building Loan Assn.,* 16 C. 2d 296, 106 Pac. 2d 4, concerned parol evidence of "the true consideration" given in connection with the execution of a note secured by a trust deed.

The correct general rule as to the non-admissibility of parole evidence is recognized and stated in the *Shiver* case (supra) as follows (p. 299):

> "As a matter of substantive law, where the parties to an agreement adopt a writing as the final and complete expressions of that agreement an integration results; the act of embodying those terms in the writing becomes the contract. Under such circumstances, extrinsic evidence to vary the terms of the written instrument is excluded, because the writing is the contract itself. This rule applies when there is a writing which has been accepted as the final memorial of the agreement of the parties." *(Estate of Gaines,* 15 Cal. (2d) 255 [100 Pac. (2d) 1055], Rest., Contracts, Sec. 230.)

The California Code of Civil Procedure applicable to the subject is as follows:

> "C.C.P. 1856 provides that:
> 'When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> 1. There a mistake or imperfection of the writing is put in issue by the pleadings;
>
> 2. Where the validity of the agreement is the fact in dispute.
>
> 'But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in

section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties. (Enacted 1872.)'

C.C.P. 1860 provides that:

'For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret. (Enacted 1872.)' "

The rule as stated in Section 1860 C.C.P. can only be invoked to explain an ambiguity which appears upon the face of the document itself.

Barnhart Aircraft Inc. v. Preston, 212 C. 19 at 22, 297 Pac. 20.

The latter case goes on at page 22 to quote from *United Iron Works v. Outer Harbor Dock & Wharf Co.,* 168 Cal. 81, 141 Pac. 917 as follows:

" 'These sections but enact the common-law rule, It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' This rule of evidence is invoked and employed only in cases where upon the fact of the contract itself there is doubt and the evidence is sued to dispel that doubt, not by showing that the parties meant something other than what they said but by showing what they meant by what they said (*Harrison v. McCormick,* 89 Cal.

327 [23 Am. St. Rep. 469, 26 Pac. 830]; *Kreuzberger v. Wingfield,* 96 Cal. 251 [31 Pac. 109]; *Balfour v. Fresno Canal Co.,* 109 Cal. 221 [41 Pac. 876]; 3 Jones' Commentaries on Evidence, Sec. 454).'

Jones on his Commentaries on Evidence, volume 3, Section 454, cited in the foregoing opinion, states the rule as follows:

'The rule has been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself. It will be found that nearly all if not all the illustrations given in the last section (entitled Proof of Surrounding Facts) recognized the general rule that the written contract must govern, and that proof of the acts, situation, and statement of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. It will also be found that in the cases where evidence of the declarations of parties has been received, the language of the writing admitted of more than one construction, either upon its face or explained by the parol evidence concerning the surrounding facts, or identifying the subject matter or the parties.

. . . Ambiguity in a written contract, calling for construction, may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense and it may be discovered on cross-examination, without precluding its explanation, but it must relate to a subject treated of in the paper and must arise out of words used in treating that subject. Such

> an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.
>
> It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The Courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language.' "

No Ambiguity.

It is appellees' position that there is no ambiguity shown by appellant which would entitle appellant to go behind the Insurance Contract and introduce testimony to vary the terms of the Contract and endorsement as introduced.

The burden is upon the appellant to show an ambiguity existing on the face of the contract. Such ambiguity must be shown by clear cut evidence. Appellant cannot just say, "There is an ambiguity" and then introduce evidence to vary the terms of the written contract.

In accord *Toth v. Metropolitan Life Ins. Co.,* 123 C.A. 185, 11 Pac. 2d 94.

These arguments of appellant's counsel have no bearing on any defense pleaded by defendant in this case.

It is elementary under the California decisions that such special affirmative defenses must be specifically pleaded to be available.

McClure v. Cerati, 86 C.A. 2d 74, 194 Pac. 2d 46.

The only special defense pleaded by the defendant in this action is contained in the Third Defense which merely states as follows:

> " 'Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage.' "

We therefore respectfully contend that the Basic Policy and Individual As Named Insured endorsement speak for themselves. There is no ambiguity and appellant should not have been permitted to attempt to write a new contract of insurance by invoking parol evidence contrary to the clear and express terms of the insurance contract.

CONCLUSION.

Appellees therefore respectfully submit that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
October 24, 1927.

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